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No. 01-732

Supreme Court, U.S.
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# In the Supreme Court of the United States

OCTOBER TERM, 2001

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**Fred Decker, Alberta Bryant, Diana Evans and Charles Sauvie,**

**Petitioners,**

**v.**

**Bill Bradbury, Secretary of State of Oregon,**

**Respondent.**

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**On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit**

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## RESPONDENT'S BRIEF IN OPPOSITION

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## QUESTION PRESENTED

Oregon's early voting statutes permit voting to begin not sooner than 18 days before federal election day, allow voting to continue through the close of the polls at 8 P.M. on election day, do not allow votes to be counted before election day and do not allow results to be announced until after the polls close on election day. Do these statutes violate federal statutes that specify a single, uniform day for conducting federal elections and that address voting in those elections?

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## SUMMARY OF ARGUMENT

In attacking Oregon's statutes that permit voting in advance of federal election day, petitioners argue that, except where Congress has required otherwise, *all* voting in federal elections must take place *on* that single day. In advancing this argument, petitioners attempt to rely on federal law addressed to the timing of federal elections and downplay or ignore other federal statutes addressed specifically to *voting in* federal elections. They take this approach because federal laws addressed to voting in federal elections do not conflict with Oregon's early voting statutes.

The federal law on which petitioners rely is an 1872 statute that, in conjunction with other statutes, provides that there shall be a uniform day throughout the country for holding the election for the offices of congressional representative, senator, and President and Vice President. That statute does not mention "voting" in those elections, let alone proscribe voting prior to election day. Nevertheless, petitioners argue that the term "election" is synonymous with "voting," and that because Congress has limited the federal election to a single day, necessarily it also has limited voting to a single day. Petitioners also resort to the statute's legislative history to argue that, indeed, this 130 year-old statute was intended not only to make uniform the day of the federal election but to restrict all voting to that day.

Every federal court that has considered petitioners' claim, including three circuit courts of appeal, has rejected it. While the analyses in these cases are not identical, they are similar to and certainly not inconsistent with one another. Moreover, they lead to the correct result. Petitioners' efforts to create a significant conflict among the circuits on the question of the validity of state early voting statutes, while creative, are simply unavailing.

The thrust of petitioners' argument on the merits is that state laws permitting early voting — including absentee voting (except as *mandated* by federal legislation) — conflict with the federal legislative design and are simply poor policy. But petitioners cannot seriously argue that all early voting in federal elections conflicts with federal policies or goals or the means Congress has selected to achieve those policies or goals. Since 1970, Congress has mandated that States allow at least some voters to vote absentee in presidential elections and has expressly stated that its mandate is not a limitation on the ability of states to go further than Congress's mandate. More recently, Congress has expressly acknowledged and relied upon state absentee voting procedures to expand absentee voting for other groups (*e.g.* handicapped and elderly voters) in *all* federal elections, not just in presidential elections.

State practices allowing unrestricted absentee voting and providing for other forms of early voting do not conflict with the federal legislative design but are consistent with that design, at least as Congress shaped it in the last half of the Twentieth Century. Whether States have gone too far and the federal legislative design should be modified to curb state voting practices in federal elections are arguments that should be made to Congress and left with that body to resolve, not this Court. Indeed, as petitioners acknowledge, Congress has been apprised of concerns raised in some quarters about states' early-voting practices. And both chambers of Congress have voting reform legislation under active consideration. Congress, not this court, is the appropriate venue in which the policy merits and demerits of early-voting practices and absentee voting in federal elections should be debated. This is particularly so, respondent submits, where petitioners' legal argument asks this court to give expansive voice to the remarks of a few congressmen expressed over a century ago, while rendering mute Congress' relatively recently expressed

desires to facilitate, rather than restrict, voting in federal elections. This court should deny petitioners' petition for writ of certiorari.

## REASONS WHY CERTIORARI SHOULD BE DENIED

### A. The analyses of the circuit courts upholding early-voting statutes, while somewhat different, do not conflict. In any event, they give rise to no significant federal concern that would justify this Court's intervention.

Petitioners assert that the circuit courts of appeal that have considered and upheld the validity of early-voting statutes are in "utter disarray as to their reasoning." Pet. 28. That is hardly the case. First, the question before each court was virtually identical: whether Congress, in specifying a single, uniform day for holding federal elections, also intended to require that all voting occur on that day. Second, each court considered essentially the same sources in arriving at its conclusion: the federal election day statutes and the legislative history of the 1872 statute[1]; this Court's decision in *Foster v. Love*, 522 U.S. 67 (1997), and the definition of election used by the court in resolving the question presented in that case; the

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[1] The 1872 statute, codified at 2 U.S.C. section 7, provides:

> The Tuesday next after the 1st Monday in November, in every even numbered year, *is established as the day for the election*, in each of the States and Territories of the United States, of Representatives and Delegates to the Congress commencing on the 3d day of January next thereafter.

As this Court explained in *Foster v. Love*, 522 U.S. 67, 69-70 (1997),

> [t]his provision, along with 2 U.S.C. section 1 (setting the same rule for electing Senators under the Seventeenth Amendment) and 3 U.S.C. section 1 (doing the same for selecting presidential electors), mandates holding all elections for Congress and the Presidency on a single day throughout the Union."

prevalence and historical practice of early voting by absentee in all states; and Congress' express recognition of, reliance on, and efforts to broaden and expand the opportunities for early voting by absentee in federal elections.[2] Granted, one can argue that each court was persuaded by somewhat different arguments or authorities in concluding that Congress did not intend to restrict all voting to election day itself. But the differences are minor and in any event would not, respondent submits, result in different outcomes among the circuits had they considered early-voting statutes other than the ones that were before them. In other words, contrary to petitioners' argument, there is nothing in the Fifth Circuit's analysis, for example, that reasonably would suggest that that court would have reached a different result had it had before it Oregon's or Tennessee's early voting statutes rather than those of Texas.

**1. Overview of circuit court decisions**

**a. *Bomer***

In *Voting Integrity Project, Inc., v. Bomer*, 199 F.3d 773 (5th Cir.), *cert den* 530 U.S. 1230 (2000), the first of the three circuit court decisions, the Fifth Circuit considered the validity of Texas' early-voting statutes, which allowed voting to begin 17 days before federal election day. The court first turned to this Court's decision in *Foster* for guidance as to the meaning of "election" as used in the federal election day statutes.

> In striking down Louisiana's open primary statute, the Supreme Court held only that elections must not be

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[2] In *Millsaps v. Thompson*, 259 F.3d 535 (6th Cir. 2001), discussed *infra*, the Sixth Circuit did not discuss Congress' efforts to mandate and expand absentee voting in federal elections, but did acknowledge state absentee voting practices and the effect petitioners' arguments would have on those practices.

"consummated" before federal election day. *Id.* at 72, n. 4.[3]

199 F.3d at 775. The Fifth Circuit then concluded that Texas' early-voting statute satisfied this test "[b]ecause the election of federal representatives in Texas is not decided or 'consummated' before federal election day. . ." *Id.* at 776. The court next addressed appellant VIP's contention that *Foster* was not controlling because that case dealt "not . . . with voting that began too early but with voting that ended too early." *Ibid.* Significantly, the court did not disagree with VIP's contention. Rather, the Fifth Circuit concluded that this Court "would not alter its definition of 'election' to require that states begin their federal election on federal election day," and set out several reasons for that conclusion. *Ibid.*

The first reason cited by the Fifth Circuit was that the plain language of the statute did not require all voting to occur on federal election day, only that the election be held that day. 199 F.3d at 776. Second, it was not inclined to give a "hypertechnical meaning" to the term "election" when this Court had declined to do so in *Foster*. *Ibid.* Third, it interpreted *Foster* as sending a "clear signal" that some acts associated with holding an election could be done in advance of election day without offending the federal statutes. *Ibid.* Fourth, it did not believe Congress would have permitted States to engage in the practice of absentee voting — a practice that necessarily was impermissible under VIP's interpretation of the federal-election statutes — over so long a period of time if Congress had attached the meaning to "election" VIP advocated. *Ibid.* Fifth, the court was persuaded, based on the voting rights

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[3] Under Louisiana's open primary system, a candidate receiving more than 50 per cent of the votes in the primary was "elected" and nothing further was required to be done — by candidates or election officials — on election day. *Foster*, 522 U.S. at 73.

acts,[4] that not only did Congress acknowledge and look "with favor" upon absentee voting, it "*required* absentee voting in certain circumstances." *Id.* at 776–77 (emphasis in original).

Finally, the court was convinced, based on an examination of legislative history, that the 1872 statute "reflects Congress's concern that citizens be able to exercise their right to vote" rather than a congressional effort to "imped[e] citizens in exercising their right to vote." *Id.* at 777. The court, quoting *Foster*, noted that Congress had identified two "primary evils" to which the 1872 statute was addressed:

> "distortion of the voting process threatened when the results of an early federal election in one State can influence later voting in other States, and . . . the burden on citizens forced to turn out on two different election days to make final selections of federal officers in presidential election years. . ." *Foster*, 522 U.S. at 73.

*Ibid.* The court concluded that neither of these purposes was in any way threatened by Texas's early-voting statutes. Texas law forbade elections officials from revealing any election results before close of the polls on election day, thus avoiding the problem of distortion. *Ibid.* And Texas's voting statutes facilitated citizens' efforts to vote by giving them more voting opportunities. *Ibid.*

**b. *Keisling***

In the present case below, *Voting Integrity Project, Inc. v. Keisling*, 259 F.3d 1169 (9th Cir. 2001),[5] the Ninth Circuit

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[4] The court's opinion referenced three congressional acts: the Voty Rights Act Amendments of 1970, 42 U.S.C. § 1973aa–1; the 1984 Voting Accessibility for the Elderly and Handicapped Act, 42 U.S.C. § 1973ee *et seq*; and the Uniformed and Overseas Citizens Absentee Voting Act of 1986, 42 U.S.C. § 1973ff *et seq*.

considered, and rejected, petitioners' challenge to Oregon's early-voting statutes that permit voters to cast ballots not sooner than 18 days before the election.[6] The Ninth Circuit began its opinion by discussing the arguments favoring plaintiffs. It noted that there was "considerable force" to VIP's textual argument that Congress, by designating a specific day as "the day for the election," "implied that the designated federal elections were to take place on that day and no other days." App. 6. It also noted that there was "force" to VIP's argument that the legislative history demonstrated that Congress intended what the text implied. App. 6. Focusing specifically on whether Congress intended to limit voting to a single day, the court gave weight to Congress's rejection of a proposal to allow some states to engage in multi-day (post election day) voting. App. 7. One State, Texas, had argued that keeping the polls open for several days after election day was necessary due to the long distances voters would have to travel to reach the polls.[7] Because Congress ultimately rejected the multi-day voting proposal, but allowed it to continue through the 1872 election, the court deemed it a "fair

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[5] Petitioners set out the reason for the change in the caption in this Court at page ii of their petition.

[6] Under Or. Rev. Stat. § 254.470(3)(a), ballots are required to be mailed to all registered voters not sooner than 18 days, and not later than fourteen days, before election day. Ballots may be returned by mail or deposited at one of the official sites for ballot deposit, but they must be received by election officials by 8 P.M. on election day. Or. Rev. Stat. § 254.470(8).

[7] The Ninth Circuit cited remarks of congressmen opposed to this practice. One argument was that a single election day would "interpose a not inconsiderable check to frauds in elections, to double voting" and allow voters to be "undisturbed by considerations which they ought not to take into account at all." App. 9–10. The second, in direct response to the multi-day (post election) day voting proposal, was that "it had never been considered necessary that four, five or six days should be allowed for the purpose of voting." App.10.

inference" that Congress intended to reject multi-day voting. App. 11.[8]

To test that inference, the court looked to factors that might cause it to conclude that Congress had not rejected the idea of multi-day voting — at least multi-day voting that preceded, rather than followed, election day. As did the Fifth Circuit, the court looked at this Court's definition of "election" in *Foster* and concluded that it "cut in favor" of allowing pre-election day voting. App. 11. This Court's definition — "the combined actions of voters and officials meant to make a final selection of an officeholder"—favored Oregon's law because "the 'final selection' cannot be made until the federal election day, while in Louisiana it could be and ordinarily was made prior to the federal election day." App. 12. As had the Fifth Circuit, the court referenced this Court's statement in *Foster* that "if an election does take place, it may not be consummated prior to federal election day." App. 12. The court concluded that Oregon's voting statutes did not result in consummation of the election prior to federal-election day. App. 12. But the court recognized that because *Foster* decided a different question, "its answer may not be controlling." App. 13.

The Ninth Circuit then turned to what it believed determined that the federal statutes did not prohibit voting in advance of election day:

> What persuades us of the proper outcome in this difficult case is the long history of congressional tolerance,

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[8] The court had prefaced this discussion with the observation that, in analyzing legislative history, the court encounters problems of "not knowing whether those who spoke represented the views of those who did not speak." App. 7. The court thus deemed the "inference" to be derived from the legislative history only a "fair" one, rather than a more forceful one.

> despite the federal election day statute, of absentee balloting and express congressional approval of absentee balloting when it has spoken on the issue. We find it difficult to reconcile a decision rejecting the Oregon law with the maintenance of absentee balloting.

App. 13. As had the Fifth Circuit, the court specifically noted that in the Voting Rights Act Amendment of 1970, 42 U.S.C. § 1973aa–1, Congress expressly both had determined that absentee voting in presidential elections was inadequate in some cases to safeguard citizens' constitutional rights, and had mandated by law that states allow absentee voting in presidential elections in accordance with requirements Congress specified. App. 14.

The court thus found itself confronted with federal statutes, one of which could be construed to prevent voting other than on election day, and the other of which clearly required absentee voting. App. 15. Given its obligation to harmonize those statutes, the court returned to this Court's definition of "election" in *Foster* as providing the "device" that accomplished the necessary result.[9] App. 15.

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[9] Harmonizing the statutes to allow voting prior to election day did not do violence to the legislative history of the 1872 statute. While the 1872 Congress rejected multi-day voting *post election* — voting that would start on election day and continue for days thereafter — it is not clear that Congress also intended to preclude pre-election-day voting. No congressman actually mentioned disallowing multi-day voting that preceded election day and ended on election day. Whether one may infer that Congress would have been concerned about pre-election-day voting as well is not at all clear because the legislative history is silent on that subject. Thus, this Court's definition of "election day" as the day the selection of an officeholder is consummated — a definition that forecloses post-election-day but not pre-election-day voting — truly does harmonize all the federal statutes and does so in a non-offensive way.

In effect, then, the Ninth and Fifth Circuits, without exactly mirroring each other's opinions, followed a distinctly similar path to the conclusion that early voting did not violate federal law. The Fifth Circuit believed that this Court would employ the definition of election in *Foster* were it confronted with an early-voting case. For basically the same reasons expressed by the Fifth Circuit, the Ninth Circuit also concluded that Congress did not intend to prohibit early voting per se.

**c. *Millsaps***

The Sixth Circuit's decision in *Millsaps v. Thompson*, 259 F.3d 535 (6th Cir. 2001), decided less than a month after *Keisling*, upheld Tennessee's early-voting statutes that allowed voting to begin 20 days before federal-election day. The Sixth Circuit began by examining the legislative history of the 1872 election-day statute, concluding as had the Fifth Circuit in *Foster v. Love*, 90 F.3d 1026 (5th Cir. 1996), that in passing this statute,

> Congress wanted to prevent States that voted early from unduly influencing those voting later, to combat fraud by minimizing the opportunity for voters to cast ballots in more than one election, and to remove the burden of voting in multiple elections in a single year.
> * * *

259 F.3d at 541. The court summarized and quoted the comments from three congressmen addressed to the 1872 statute, the proposed amendment that would have authorized states conducting their elections on multiple days beyond election day to continue to do so, and the amendment that authorized voting to continue after election day in the 1872 presidential election. *Id.* at 541–43.

The court, however, drew no immediate conclusions from this legislative history. Instead, it shifted its focus to plaintiffs' arguments that were based on their interpretation of

*Foster*. 259 F.3d at 543. The thrust of plaintiffs' arguments was that an "election within the meaning of the federal elections statutes means 'the process of voting by the electorate at large to select an officeholder.'" *Ibid.* Because the process of voting occurs on more than one day, election day, and the federal statute limits the election to a single day, plaintiffs argued that the Tennessee statutes violate federal law. *Ibid.*

The court reviewed *Foster* and then rejected plaintiffs' definition of election. It agreed that *Foster* "provided guidance" on the meaning of "election" as used in the federal election statutes. 259 F.3d at 543. However, the Sixth Circuit focused on this Court's statement that the term "election" was intended to "'refer to the *combined actions of voters and officials meant to make a final selection of an officeholder.*'" *Millsaps*, 259 F.3d at 543 (quoting *Foster*) (emphasis 6th Circuit's). Louisiana's election process, the Sixth Circuit observed, violated federal law because "no action at all" occurred on the day set aside for the election. *Ibid.* The Sixth Circuit also quoted *Foster's* oft repeated footnote that "'if an election does take place, it may not be consummated prior to federal election day.'" *Id.* at 544.

The Sixth Circuit then examined the district court's opinion. The court noted that the district court, like the Fifth and Ninth Circuits, had "deferred to the authority of *Foster*" and "refused to accept arguments that they took to require striking down absentee voting statutes by implication." 259 F.3d at 545. The Sixth Circuit viewed the Fifth and Ninth Circuit decisions as upholding early-voting statutes in part because those statutes facilitated rather than hindered voting, and thus were compatible with the federal statutes. *Ibid.*

The Sixth Circuit returned to *Foster* and analyzed the early-voting statutes and plaintiffs' arguments under that decision. The Sixth Circuit found no support in *Foster* for

plaintiffs' contention that marking ballots and tendering them to election officials satisfied *Foster's* definition of election and, thus, were acts that must occur on election day. 259 F.3d at 545. Nor did the court agree with plaintiffs that the mere receipt of ballots by public officials prior to election day result in the "final selection." Rather, "final selection," the court said, requires the completion of several additional acts, all of which occur after ballots are received. Thus, receipt of ballots, "without more, is not an act meant to make a final selection." 259 F.3d at 545–46. The receipt of ballots, standing alone, is therefore not an "election," and need not occur on the day set aside for the election. The Sixth Circuit stressed *Foster's* "narrow holding suggest[ing] that, so long as a State does not conclude an election prior to federal election day, the State's law will not 'actually conflict' with federal law." *Id.* at 546.

The court also rejected plaintiffs' attempt to "raise the specter" that, interpreting federal law to prohibit only concluding an election before election day would permit states to "manipulat[e] federal elections" by "schedul[ing] voting to occur at times entirely removed from federal election day and simply counting ballots on the first Tuesday after the first Monday in November. . ." *Ibid.* This case, the court noted "does not present such a scenario" because "Tennessee's statute requires substantial official action on the congressionally prescribed day, and considerable voting continues to take place on election day itself." *Ibid.*

The court similarly disposed of plaintiffs' *expressio unius est exclusio alterius* argument. Plaintiffs argued that Congress had specified a single day as the day for the election, that the term "election" includes voting, and thus voting must occur on the day designated for the election. The court noted plaintiffs' reliance on the legislative history as support. But the court viewed *Foster* as "foreclos[ing]" plaintiffs' argument:

> So long as no combined action occurs on any day other than federal election day, or so long as any such combined action is not intended to make a final selection of a federal officeholder, a State has complied with the federal elections statutes. Put another way, the plaintiffs' argument assumes the answer to the question presented by this case, namely the statutory meaning of an "election" under federal law. *An "election" under the federal statutes requires more than just voting, and the Early Voting Statutes do not create a regime of combined action meant to make a final selection on any day other than federal election day.*

259 F.3d at 547 (emphasis added).

Addressing the legislative history, the court observed that this Court in deciding *Foster* was well aware of that same history and yet had defined election as "'the combined actions of voters and officials meant to make a final selection of an officeholder.'" 259 F.3d at 547. But the court also noted its agreement with other courts that the "practical effect" of accepting plaintiffs' argument would be a "declaration that federal law preempts a widely accepted and long-standing electoral practice," namely, absentee voting. *Ibid.* The court did not agree with plaintiffs that recognizing an exception for absentee voting from the single-day voting requirement could be upheld on the basis that such voting would be but a *de minimis* deviation and one that could, therefore, be ignored. *Id.* at 548. The court expressed its unwillingness to accept the "grave implications of the plaintiffs' arguments." *Ibid.*

Finally, the Sixth Circuit concluded that upholding early voting did not actually conflict with the means — a uniform election day — that Congress chose to achieve its objectives. First, the court concluded that requiring all voting to occur on election day was not necessary to achieve Congress' multiple

objectives. 259 F.3d at 548. Those objectives were to prevent early elections from influencing later elections in other states, to reduce the burden on citizens of having to vote in multiple elections in a single year and to prevent election fraud in the "narrowest sense, that of voting in federal elections held in more than one state." *Id.* at 548–49. Allowing early voting did not "stand as an obstacle to substantial achievement of those goals." *Id.* at 549. Second, the court observed that if it were to accept that Congress chose a single day of voting as the means to combat voter fraud, then States would be prevented from being able to adopt other means of addressing voter fraud. *Ibid.* The court was unwilling to ascribe that intent to Congress:

> Just as the plaintiffs' position asks too much because it cannot in a principled fashion distinguish absentee voting, so too the plaintiffs cannot seriously contend that Congress intended the federal election statutes to preempt additional State measures designed to protect against fraud. We decline to accept an argument that would negate the ability of the States to guard against fraud in the exercise of the fundamental right of voting.

*Ibid.* The court concluded by saying that the "Tennessee law interacts with federal law to form a harmonious system for the administration of federal elections, at least so far as their timing is concerned." *Ibid.*

**2. The circuit courts' analyses do not conflict.**

The circuit courts in *Bomer, Keisling and Millsaps* all considered the following sources: 1) the text of the 1872 statute; 2) the statute's legislative history; 3) this Court's decision in *Foster*; and 4) longstanding state absentee voting practices. *Bomer* and *Keisling* also stressed Congress's acquiescence in, support for, and, as to some voters in presidential and vice-

presidential elections, the mandate for absentee voting at the state level. Granted, the courts did not give the same weight to each of these sources, nor did the courts consider them in the same order. But at least three common analytical threads emerge:

> 1) By establishing "the" day for federal elections, the text of the statute implied at least that Congress intended to have only a single day for federal elections. Beyond that, the meaning of "election" was not clear.
>
> 2) *Foster* was at least instructive on the issue because it defined an election to require more than just voting—and more than just official action. An election was the "combined action of voters and officials meant to make a final selection of an officeholder." Under that definition, an election did not occur before election day just because voters were allowed prior to election day to deposit their ballots with election officials.
>
> 3) Plaintiffs' argument would mean the invalidation of all absentee voting in the country, except as to that which Congress mandated be allowed to take place in elections for President and Vice President.

These common threads are interwoven in the courts' decisions. The analyses do not conflict.

### 3. The circuit courts' decisions will not open the floodgates to ill-conceived early voting statutes and do not create confusion and uncertainty in this area.

Not only are the analyses in the three cases — and the results reached — consistent, the analyses contain no suggestion that other early-voting statutes, varying materially from

those before the courts, would also be deemed consistent with federal law. Nothing in these opinions reasonably supports petitioners' argument that an early-voting statute that required all voting to end before election day, leaving only vote-counting to be done on election day (Pet. 30), would pass federal-conflict scrutiny. Indeed, the Sixth Circuit expressly refused to consider that "specter," noting simply that in Tennessee's system, substantial official action and considerable voting still took place on election day.

Under Texas's and Oregon's early voting systems, as under Tennessee's, substantial official action and considerable voting take place on federal-election day. But what is probably more significant than the amount of voting that actually takes place on election day is that the statutes require that the polls be open on election day, thus allowing voters to vote up to the time the polls close on that day.[10] Also significant is that vote counting does not begin until election day. States considering permissive early-voting statutes like those in Texas, Tennessee, or Oregon simply do not need this Court to straighten out the law in this area. The analyses used by the circuit courts create no confusion or uncertainty as to what other States may do with similar early-voting statutes.

The only uncertainty that may exist is how these or other courts might decide a case involving a materially different early-voting system — one for example that terminated voting before election day, or that allowed voting to start months before federal election day, or one that began counting votes as they came in before election day. But uncertainty as to how a

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[10] Respondent submits that the constitutionality of two states' virtually identical voting systems should not hinge on the fact that only a small percentage of voters vote on election day in one State, while in another State, a large percentage of votes are cast on election day. What should be significant, rather, and what is present here is that the polls are open on election day and accessible to the voters.

court would rule in a case involving materially different facts inheres in the judicial process. Suffice it to say that in the case before this Court, the polls remain open on election day, but not thereafter, and votes are not counted until election day. This Court may, if necessary, address the validity of a materially different early-voting system if and when it is enacted.

### B. Petitioners' attack on the Ninth Circuit's decision is flawed in several respects.

#### 1. Petitioners mischaracterize the Ninth Circuit's decision.

Petitioners characterize the Ninth Circuit as having concluded that the 1872 statute was intended to limit voting to a single day — federal-election day. Pet. 10, 20. From this premise, they then argue, *inter alia*, that the Ninth Circuit erred in concluding that subsequent congressional acquiescence in absentee voting and the congressional mandate that absentee voting be allowed in presidential and vice-presidential elections — at least as to some voters — effected an implied repeal of the 1872 ban on all early voting. Pet. 18–25.

Petitioners' characterization is wrong: the Ninth Circuit did not conclude that Congress, in enacting the 1872 statute, intended to limit voting to election day.[11] The most that the

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[11] As discussed *supra*, p. 7, the court said that the text of the statute lent "considerable force" to petitioners' argument that the 1872 Congress intended to limit federal election day to a single day. App. 6. Respondent has always agreed. The court also concluded that there was "force" to petitioners' argument that the legislative history supported that interpretation, *i.e.*, that Congress intended to limit federal election day to a single day.. *Id.* Again, respondent agrees. Thus, the Ninth Circuit's "force" statements were in reference to Congress' intent that the *election* be confined to a single day and not, as petitioners represent, to the argument that Congress intended to confine *voting* in federal elections to a single day.

Ninth Circuit said about voting in reference to the 1872 statute was that it was a "fair inference" that Congress, in rejecting a proposed amendment that would have allowed multi-day voting beyond the 1872 election, rejected the notion of multi-day voting. App. 11. The court then said that petitioners had made "substantial arguments" based on the text and legislative history. App. 11. But the court did not conclude that Congress in fact, in passing the 1872 statute, intended to limit voting to a single day, or more specifically, to prevent all voting in advance of federal-election day.

**2. Petitioners' arguments assume the answer to the question presented.**

In addition to mischaracterizing what the Ninth Circuit held or concluded in this case, many of petitioners' arguments assume the answer to the very question this case poses: whether Congress intended to limit all voting to election day. Their argument, for example, that Oregon's statutes are preempted by federal law (Pet. 16) assumes that Congress chose "single-day voting" as the method to combat election fraud. Their "canons of statutory construction" argument (Pet. 17–18) is based on the premise that election day is the day Congress designated for all voting to occur. Petitioners' "presumption against implied repeals" argument (Pet. 19–25) is based both on their erroneous statement that the Ninth Circuit concluded that the 1872 statute intended to limit voting to a single day, and their assertion that it does.

**3. The Ninth Circuit's analysis is not inconsistent with *Crosby* or *Locke*.**

Petitioners contend that the Ninth Circuit's decision conflicts with two recent preemption decisions of this court — *Crosby v. National Foreign Trade Council*, 530 U.S. 363 (2000) and *United States v. Locke*, 529 U.S. 89 (2000). Petitioners argue that the Ninth Circuit ignored the teachings of *Crosby* by "attaching significance to Congress's failure to

by "attaching significance to Congress's failure to expressly preempt absentee and early-voting systems of which it was aware." Pet. 18. They also argue that the Ninth Circuit violated *Locke* by giving expansive scope to a savings clause contained in Section 1973 aa–1(g). Pet. 23–24.

Petitioners' *Crosby* argument is based on a misstatement of what the Ninth Circuit said. The court did not discern congressional intent from Congress's failure expressly to preempt state early-voting laws. Rather, the court deemed significant "express congressional approval" of absentee voting "when [Congress] has spoken on the issue." App. 13. At most, *Crosby* suggests that congressional inaction in response to state laws is a weak reed on which to base a conclusion that Congress thereby approved of those laws. *Crosby* is thus inapposite here because the Ninth Circuit relied on congressional action affirmatively expressing approval of and relying on those state laws.

*Locke* is distinguishable from this case. In *Locke*, this Court had to interpret the scope of two "savings" clauses contained in one title of a multi-titled, multi-subject, preemptive congressional act. The savings clauses allowed states to impose liability for oil pollution, the same subject addressed by the title of the act in which the savings clauses appeared. The question was whether Congress intended that the savings clauses re-vest States with regulatory authority as to other subjects that Congress had, in the other titles of that act and in another act, clearly foreclosed. Against the backdrop of a pervasive federal regulatory scheme, this Court concluded that Congress intended only to re-vest States with regulatory authority as to the specific subject matter addressed by the title of the act that contained the savings clauses. 529 U.S. at 106. This Court was simply unwilling to assume that Congress had, in this indirect manner, intended to re-vest States with broad regulatory authority. *Ibid.*

In the present case, of course, there is no pervasive regulatory scheme, at least none pre-dating 1970, governing the subject of voting in federal elections. Moreover, were petitioners correct that the 1872 statute did address voting, then *Locke* is inopposite. Here, the federal statute containing the savings clause (42 U.S.C. section 1973aa–1) and the 1872 statute would address the same subject-voting. In *Locke*, by contrast, the title containing the savings clause and the statutes to which the state attempted to have the savings clause apply addressed different subjects. The indirection of which this court was concerned in *Locke* simply is not present in this case.

Moreover, the Ninth Circuit did not, as petitioners assert, rely on the savings clause itself "to limit the preemptive effect of the federal election day statutes." Pet. 24. Rather, the court used the savings clause to interpret the statute in which it appeared – 42 U.S.C. section 1973aa. The court was addressing the argument that Congress, in section 1973aa, may have intended only to allow absentee voting for those voters physically absent from the State. App. 14. But the savings clause — providing that "nothing in this section shall prevent any State or political subdivision from adopting less restrictive voting practices than those that are prescribed herein" — dispelled any suggestion that Congress intended such a limitation. App. 14. Thus, the Ninth Circuit's reliance on the savings clause here was for a very different purpose than its reliance on the savings clause with which this Court found fault in *Locke.*

**4. Congress's usage of the term "election" defeats petitioners' textual argument.**

Petitioners further argue that "there can be no dispute that the plain and ordinary meaning of the word 'election' means *voting* to select an officeholder," and that, therefore, "the fed-

eral election day statutes mean 'voting' when they refer to 'election.'" Pet. 17. Petitioners' argument relies on dictionary definitions which they assert demonstrates that "election" is synonymous with "voting." Pet. 17.

Respondent disagrees that these definitions suggest that the act of voting, without more, makes an election. But what is more significant is that Congress has not used "election" in that sense. In the Voting Rights Act Amendments of 1970, 42 U.S.C. § 1973aa, Congress, *inter alia*, imposed uniform national rules for absentee voting in elections for President and Vice-President. In section 1973aa–1(d), Congress required that

> each State shall provide by law for the casting of absentee ballots for the choice of electors for President and Vice President, or for President and Vice President, by all duly qualified residents of such State who may be absent from their election district or unit in such State on the day such election is held and who have applied therefore not later than seven days immediately prior to such election *and have returned such ballots to the appropriate election official of such State not later than the time of closing of the polls in such State on the day of such election.*

(Emphasis added). In this statute, Congress makes it plain that the "day of the election," in reference to federal-election day, is not the day all votes are cast. A person is entitled to vote by absentee ballot provided the person applies for a ballot at least seven days before the "election" and returns the ballot "not later than the time of closing of the polls . . . on the day of such election." Thus, Congress clearly contemplated and envisioned that voters would complete the act of voting prior to the day of the federal election. Congress has not, therefore,

used the term "election" to mean the day that all voting is to occur.

That Congress has not intended voting, standing alone, to constitute an "election" is also apparent from other federal statutes that address, but do not mandate, absentee voting in federal elections. In 42 U.S.C. § 1973ee–3, Congress has prohibited states from requiring handicapped persons to submit medical certification to receive an absent ballot for a "federal election." It has also required states to provide elderly and handicapped voters with notice of procedures for voting absentee in federal elections. In 42 U.S.C. § 1973ff–1 Congress has required that States permit "absent uniformed services voters and overseas voters to use absentee registration procedures and to vote by absentee ballot in general, special, primary and runoff elections for federal office." Congress's usage of "federal election" in these statutes is not in reference to the day absentee votes are cast, because clearly Congress contemplated that the casting of absentee votes could and in most cases almost necessarily would be done in advance of federal-election day. Thus, Congress in these statutes specifically addressing voting in federal elections, has not used the term "election" as synonymous with the day votes are cast.

### C. The Ninth Circuit appropriately did not conclude that the 1872 statute foreclosed all voting in advance of election day.

There are several reasons why the Ninth Circuit — as well as the other circuits that have considered the question — appropriately did not conclude based on text and legislative history that Congress, in enacting the 1872 statute, intended to limit all voting to election day. First, as the Ninth Circuit recognized, searching the legislative history for evidence of Congress' actual intent "presents all the usual problems of legislative history, such as not knowing whether those who

spoke represented the views of those who did not speak." App. 7. That observation is particularly apt given the very few congressmen who actually said anything relevant to the issue of voting in connection with federal elections in 1872.

Second, when the 1872 statute was enacted, States were permitting absentee voting, at least by soldiers. App. 14. That no one expressed the intent to eliminate absentee voting should be almost irreconcilable with the contention that Congress intended to prohibit all forms of early voting.

Third, the multi-day voting proposal that was rejected was addressed to voting *after* federal-election day, not before. Allowing voting after federal-election day would disserve other congressional objectives — such as preventing states that conclude their elections early from influencing the outcomes in states that conclude their elections later. It very well could be that Congress did not want to allow voting to occur after federal-election day, but, in light of the emergence of absentee voting for soldiers, intended to say nothing about whether voting should also be prohibited before federal-election day.

Finally, the Ninth Circuit, as did the Sixth and Fifth Circuits, properly declined to conclude that Congress had preempted the states' early voting laws given that Congress did not clearly express its intent in the 1872 statute to prohibit all such laws. Regulating elections in general and voting in particular is a core area of state responsibility and sovereignty. *Lassiter v. Northhampton County Bd. Of Elections*, 360 U.S. 45, 50 (1959) ("The States have long been held to have broad powers to determine the conditions under which the right to suffrage may be exercised.") Article I, section 4 of the United States Constitution recognizes this responsibility even in the regulation of voting in federal elections.[12] Whenever a ques-

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[12] Article I, Section 4, clause 1 of the United States Constitution provides:

tion of preemption arises as to an area traditionally occupied by the States, this Court must satisfy itself that Congress clearly has articulated its intent to preempt. *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1946) (When Congress legislates in an area that States have "traditionally occupied * * * we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress"); *Hillsborough County v. Automated Med. Labs.*, 471 U.S. 707, 715–16 (1985) ( same).[13] In the present case, the only clear expression of congressional intent is to require a uniform day for federal elections. That is not sufficient to demonstrate that Congress's clear and manifest purpose was to prohibit all voting in advance of federal-election day.[14]

### D. Congress, rather than this Court, should address petitioners' policy-laden concerns about early voting in federal elections.

Petitioners express policy concerns that early voting laws, for example, will promote election fraud (Pet. 33), will allow

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The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators.

[13] This Court most recently applied the clear statement principle in *Raygor v. Regents of the University of Minnesota*, No. 00-1514, Feb. 27, 2002, 2002 WL 269234 (Holding that 28 U.S.C. § 1367 does not toll the limitations period for state law claims asserted against nonconsenting state defendants that are dismissed on Eleventh Amendment grounds).

[14] Whether Article I, section 4 is viewed as a delegation of power to the States or an express reservation of power in the States, subject to Congress' override, should not affect the pre-emption analysis. As with powers exercised by States that affect interstate commerce, thus giving Congress the power to override state authority, Congress must be clear about its intent to do so.

citizens to vote based on "knowledge available on a smattering of days," (Pet. 32, quoting the report of the National Commission on Election Reform, "To Assume Pride and Confidence in the Elections Process," at 43) and will "open the door . . . to further balkanization of the timing of voting in federal elections (Pet. 36).

Whether early voting in federal elections in the 21st Century should be banned altogether, whether it should be limited to "for cause" absentee balloting, or whether individual states should have the freedom to make it an option for a wider class of voters — or even all of its voters —is a policy issue that should be left to Congress to decide. Not only is Congress uniquely situated to consider and evaluate the arguments for and against early voting, and the breadth of any early voting that should be allowed, Congress presently has before it two bills, one in each chamber, that address voting reform.[15] Within the context of considering voting reform, there can be little to no doubt that Congress is aware of states' early-voting practices.[16] This Court, at a minimum, should give Congress a full opportunity to address the issues and to weigh the consequences of any policy decision to restrict early voting.

Finally, petitioners agree that, under their argument, States would be required to allow some groups of voters to vote early, by absentee, in presidential elections, and could allow other groups to do so as well. But a necessary by-product of their argument, if accepted, would be that States could not allow those same groups to vote absentee in off-year federal elections. Every two years then, States would have to shift back and forth, mandated by Congress to allow absentee voting one election but prohibited by Congress from allowing

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[15] The two bills are S. 565 and H.R. 3295.

[16] See, e.g., Cong. Rec. S1415-17 (daily ed. March 4, 2002) (discussion and vote on motion to bring debate on S. 565 to a close).

any the following election. That is a necessary product of petitioners' argument, because — they assert — only absentee voting mandated or expressly authorized by Congress — *i.e.* that provided for in 42 U.S.C. section 1973aa — could survive the 1872 prohibition on early voting. This is but another reason why Congress, not this Court, should sort out the early-voting question this case poses.

## CONCLUSION

For the reasons set forth above, the petition for writ of certiorari should be denied.

Respectfully submitted,

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